(16)

NO. 95-789

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

STATE OF CALIFORNIA, Division of Labor Standards Enforcement, Division of Apprenticeship Standards, Department of Industrial Relations, County of Sonoma,

Petitioners,

v.

DILLINGHAM CONSTRUCTION, N.A., Inc., Manuel J. Arceo, dba Sound Systems Media,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE STATES - WASHINGTON, NEW YORK, ET AL., AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether Congress, in enacting the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1001 *et seq.* ("ERISA"), intended to preempt traditional state labor laws which restrict a public work contractor's payment of a specific lower wage to apprentices duly registered in programs meeting federally promoted minimum standards?

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I. INTEREST OF THE AMICI

Washington, New York, Arkansas, Delaware, Hawaii, Maine, Maryland, Massachusetts, Michigan, Minnesota, Montana, Nevada, New Jersey, Oregon, Pennsylvania and the District of Columbia submit this brief as *amici curiae* in support of petitioner, State of California, and urge this Court to reverse the decision of the United States Court of Appeals for the Ninth Circuit in *Dillingham v. State of California*, 57 F.3d 712 (9th Cir. 1995). This brief is submitted on behalf of fifteen states, by their attorneys general. As a result consent to its filing is not required. SUP. CT. R. 37.5.

The *amici* States have a strong interest in ERISA preemption issues.[1] States have an interest in assuring that the scope of ERISA preemption is kept within the ambit of Congressional intent and that the States' remaining sphere of regulation is not improperly intruded upon. Although the scope of ERISA preemption is broad, there is no indication that Congress intended to preclude traditional state regulation of wages, or the quality of apprenticeship or any other benefit an ERISA plan may provide.

The *amici* States have a specific interest in this case, since many of them, like California, allow payment of lower "apprentice" wages on state public work projects only to apprentices registered in programs which meet federal minimum standards established under the National Apprenticeship Act, 29 U.S.C. § 50 ("Fitzgerald Act"). These standards are the result of a longstanding cooperative federal-state effort in the formulation, promotion, and

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[1] Employee Retirement Income Security Act of 1974, Pub. L. No. 93-406, 88 Stat. 829 (codified as amended at 29 U.S.C. §§ 1001-1461 (1988 & Supp. V 1993)).

enforcement of quality apprenticeship programs and standards through program registration. The standards are designed to protect apprentices from exploitation and poor training and to protect the public by assuring that apprentices acquire the highest quality skills.

Apprenticeship programs are not required to register in order to operate. Instead, the *amici* States, following the lead of the federal government, offer incentives to apprenticeship programs which agree to meet the minimum standards. The single most important incentive for programs to register is the ability to pay a lower wage to apprentices on public construction projects.

The Ninth Circuit's decision must be reversed in order to maintain traditional state authority to regulate wages; to protect and preserve the respective prevailing wage laws of *amici* States represented herein; and to secure the longstanding federal-state cooperative effort in the formulation, promotion, and enforcement of quality apprenticeship programs and standards. Cooperative federal-state regulation of apprenticeship is seriously undermined by application of the statutory analysis of ERISA provisions utilized by the Court of Appeals for the Ninth Circuit in *Dillingham*.

II. SUMMARY OF ARGUMENT

Preemption of laws that restrict apprentice wage rates to apprentices in programs which meet federal minimum standards will significantly impair the enforcement of quality apprenticeship standards and undermine state prevailing wage and minimum wage laws. If the Ninth Circuit's decision is upheld, anyone in an apprentice program subject to ERISA can be paid an

apprentice wage on state public construction projects, no matter how dubious the quality of the training provided. As a result, apprenticeship programs will have few incentives to adhere to the federal minimum standards. Without adherence to the standards, the quality of apprenticeship training will suffer, with a concomitant fall in the quality of the craft work done by these apprentices both now and in the future when they master journey level skills.

In addition, the states' longstanding prevailing wage laws will be easily circumvented. Employers will be able to establish apprenticeship programs of questionable quality and complete public construction projects with these "apprentices" at a lower cost, enabling them to underbid employers with more costly registered apprenticeship programs. In the absence of some uniform definition, anyone labelled an "apprentice" will be paid less than prevailing journey level wages, regardless of whether they are receiving the training and supplemental instruction necessary to master their craft. If this happens, states may be inclined to bar apprentice wages on state public works projects. This would further limit the work and training opportunities for legitimate apprentices.

California's prevailing wage exemption for registered apprentices is a law of general application which does not refer to, single out, or subject ERISA plans to different treatment. The law applies to all apprentices regardless of whether the apprenticeship program is a benefit provided by a plan subject to ERISA.

By allowing only registered apprentices to be paid a lower wage, California's law provides an indirect economic incentive for apprenticeship programs to meet minimum standards through registration. However, it does

not bind plan choice. A contractor who chooses not to use registered apprentices has numerous options and many apprenticeship programs continue to operate unregistered. Since the law operates merely as an indirect economic influence on a plan's decision, it is insufficiently related to ERISA to be preempted.

California's apprentice exemption also does not relate to ERISA plans because it does not influence choice of plan structure or administration. The minimum apprenticeship standards relate solely to the quality of apprentice training, the benefit provided by plans, rather than the plan itself. This distinction is critical because ERISA does not preempt state laws that relate solely to benefits.

States have traditionally regulated the quality of health care, legal services, day care, and apprenticeship training. When these benefits are provided by ERISA plans, ERISA governs the administration of the plan, but it does not regulate the quality of the benefits. There is no indication that Congress intended to strip the States of their ability to apply quality control standards to these traditional areas of State concern simply because the benefits are provided by ERISA plans.

III. ARGUMENT

A. Preemption Will Significantly Impair The Longstanding Federal-State Cooperative Effort In The Formulation, Promotion, And Enforcement Of Quality Apprenticeship Programs And Standards As Well As The Respective Prevailing Wage Laws Of *Amici* States.

The education of youth is a matter of traditional state concern. Apprenticeship is one of the oldest forms of training young people in a skilled craft. It combines the learning of manual skills with the study of related classroom subjects. The states have been involved in apprenticeship training since colonial times. R.F. Seybolt, COLONIAL APPRENTICESHIP AND EDUCATION, (1917). Between 1783 and 1799, twelve of the sixteen States of the Union passed statutes concerning apprenticeship. W.J. Rorabaugh, THE CRAFT APPRENTICE: FROM FRANKLIN TO THE MACHINE ERA IN AMERICA 51 (1986). These laws codified practices inherited from the English Common Law. In the 1800's States started regulating apprentice indenture agreements. *Id.* For example, New York first enacted legislation regulating apprenticeship indenture agreements in 1830. New York State Department of Labor, REGISTERED APPRENTICESHIP TRAINING IN NEW YORK STATE, 1 (1980). In 1871, it enacted a comprehensive apprenticeship law. New York's concern with the quality of apprenticeship training was reflected in the law's requirement that employers "carefully and skillfully" train apprentices. 1871 N.Y. Laws ch. 934, pp. 2147-50. Wisconsin developed the modern model for governmental stimulation of formal apprenticeship training when, in 1911, it passed a law establishing a state apprenticeship council. 1911 Wisc. Stats. Ch. 347.

A vigorous, coordinated, national apprenticeship policy came into existence with the passage of the Fitzgerald Act in 1937. 29 U.S.C. § 50. The focus of the Act was to protect "apprentices through the establishment of minimum labor standards, promoting apprenticeship as a system of training skilled workers and encouraging the federal government to cooperate with state agencies in formulating apprentice standards." *Joint Apprenticeship and Training Council of Local 363 v. New York State Dep't. of Labor*, 984 F.2d 589, 591 (2d Cir. 1993) (*citing* 29 U.S.C. § 50-50b (1988 & Supp. III 1992) and statements of Representative Fitzgerald in the Congressional Record).

One of the federal government's first goals under the Fitzgerald Act was to encourage maximum state involvement. Model state apprenticeship legislation was drafted. Many states, following the Fitzgerald Act's commitment to the welfare of apprentices and desire to foster cooperation with states, enacted complementary state apprenticeship councils or programs[2] These programs reflected the existence and the need to adopt or harmonize apprenticeship standards with the policies of the United States Department of Labor. From the passage of the Fitzgerald Act to July 1945, "twenty-four states had established apprenticeship councils either under specific

[2] The twenty-seven states have state Apprenticeship Agencies or Councils which are recognized by the Bureau of Apprenticeship and Training of the Department of Labor. They are: Arizona, California, Connecticut, Delaware, Florida, Hawaii, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Minnesota, Montana, Nevada, New Hampshire, New Mexico, New York, North Carolina, Ohio, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington and Wisconsin. The District of Columbia, Puerto Rico and the Virgin Islands are also recognized. U.S. Dept. of Lab., Emp. & Training Admin.: Bureau of Apprenticeship & Training, Directory (Jan. 1995).

state laws or under the general powers of the governor or the commissioner of labor. A new era in the development of apprenticeship had begun." Eugene Danaher, *Apprenticeship Practice in the United States* 3 (1945). The states continue to encourage the creation of quality apprenticeship programs.

Directives from the Secretary of Labor have been integral to the development of state apprenticeship programs. Staff and field representatives of the Federal Bureau of Apprenticeship and Training have consistently been instructed to work with state apprenticeship councils to do the most for apprenticeship. For example, as early as 1948 it was noted:

> to assure complete cooperation between the State and Federal apprenticeship agencies it is essential that there be clear understanding between them as to the functions and responsibilities of each. ...As a rule it can be said that the State apprenticeship agency is responsible for the development of standards and policies and the Bureau of Apprenticeship is responsible for executing the policies that is, for developing local and State programs of apprenticeship and for maintaining them. In some instances it has been found practical to share office space with State apprenticeship councils.

U.S. Dept. of Labor, Bureau of Apprenticeship, *Manual for Field Representatives* 15-16 (1948); U.S. Dept. of Labor, Manpower Administration, *Bureau of Apprenticeship and Training Policy Manual* 30 (1968); and U.S. Dept. of Labor, Manpower Administration, *Handbook for Bureau of Apprenticeship and Training* 34 (1974).

As Congress was considering and enacting ERISA, the U.S. Department of Labor was emphasizing the cooperative federalism scheme of the Fitzgerald Act. Soon after ERISA was passed, the Bureau of Apprenticeship and Training sent a circular to its field staff stressing that its policy was to promote and establish State Apprenticeship Agencies or Councils in all states and to cooperate with established councils in the promotion of apprenticeship standards. Bureau of Apprenticeship and Training, Circular No. 75-25, U.S. Department of Labor, (May 30, 1975). Federal regulations, first proposed in 1975 and finally promulgated in 1977, state:

> The purpose of this part is to *set forth labor standards to safeguard the welfare of apprentices*, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain Federal purposes, of acceptable apprenticeship programs with the U.S. Department of Labor. ... *These labor standards*, policies and procedures *cover the registration ... of apprenticeship programs* and of apprenticeship agreements; *the recognition of a State agency as the appropriate agency for registering local apprenticeship programs* for certain Federal purposes; and matters relating thereto.

29 C.F.R. § 29.1. (1994) (emphasis added).

The regulations that implement the Fitzgerald Act permit state agencies to apply to the United States Secretary of Labor for federal recognition as a State Apprenticeship

Agencies or Council.[3] If the state agency's standards and procedures are in conformity with federal standards, the state becomes federally approved and empowered to establish, for federal and state purposes, requirements for apprenticeship programs as well as procedures by which to determine issues of registration. *Local 363 v. New York State Dept. of Labor*, 829 F.Supp 101, 103 (S.D.N.Y. 1993); 29 U.S.C. §§ 50-50b (1994). The establishment of *amici* State apprenticeship programs predates the 1974 enactment of ERISA.[4]

The Fitzgerald scheme is voluntary. Apprenticeship programs are encouraged, but not required, to meet minimum federal standards through program registration. The major incentive for contractors to use apprentices in registered programs is the ability to pay those apprentices less than prevailing wages on publicly funded construction, *See* General Accounting Office, *Apprenticeship Training:*

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[3] Section 1 of the National Apprenticeship Act of 1937 (29 U.S.C. 50). Additional rulemaking authority is supported by the Reorganization Plan No. 14 of 1950 (64 Stat. 1267; 3 C.F.R. 1949-53 Comp., p. 1007), the Copeland Act (40 U.S.C. § 276c (1994)), and 5 U.S.C. § 301 (1994).

[4] DEL. CODE ANN., tit. 19, §§ 201, 203 (1995) (enacted 1963); HAW. REV. STAT. § 372-4 (Michie 1995) (enacted 1941); ME. REV. STAT. ANN. tit. 26, § 1002 (West 1995) (enacted 1954); MD. ANN. CODE, LAB. & EMPL. ART., § 11-405 (1995) (enacted 1957); MASS. GEN. LAWS ANN. ch. 23 § 11E (West 1995) (enacted 1941); MINN. STAT. § 178 (1994) (enacted 1939); MONT. CODE ANN. § 39-6-101 (1993) (enacted 1941); NEV. REV. STAT. § 53.610.020 (1993) (enacted 1939); N.J. REV. STAT. ANN. § 34:1A-36 (West 1995) (enacted 1953); N.Y. LAB. LAW § 810 *et seq.* (McKinney 1989) (enacted 1945); OR. REV. STAT. § 660.120 (1993) (enacted 1955); 43 PA. CONS. STAT § 90.3 (West 1995) (enacted 1961); WASH. REV. CODE § 49.04.010 (1994) (enacted 1941).

Administration, Use and Equal Opportunity, GAO/HRD 92-43, 11 (1992).

State regulation of wages on public works projects is also a longstanding area of state concern. Thirty-one states have enacted prevailing wage laws which require contractors who perform public works projects to pay their workers on these projects not less than wages which prevail in the community.[5] Twenty-seven of these states allow payment of apprentice prevailing wages but restrict the lower wage to apprentices registered in apprenticeship programs which meet federal minimum standards.[6] Many of these state provisions also predate the enactment of ERISA. The purpose of these statutes is to provide an objective, readily determinable standard to ascertain whether a person designated as an apprentice on public work is a legitimate apprentice, entitled to receive less than

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[5] Armand J. Thieblot, *Prevailing Wage Legislation: the Davis-Bacon Act, State "Little Davis-Bacon" Acts, the Walsh-Healey Act, and the Service Contract Act* 140 (2d Print 1987). Mr. Thieblot's article included a table identifying the existence of prevailing wage laws by state and date of enactment. A copy of that table is attached as Appendix A-1. Since the table was last published additional states have repealed their prevailing wage laws. Louisiana repealed its prevailing wage law in 1986. Texas repealed its prevailing wage in 1987. Oklahoma has its prevailing wage law invalidated by court decision in 1995.

[6] The state provision of lower apprentice wage rates is in effect through statutes, rules and regulations. Illustrative amici State statutory references are: ARK. CODE ANN. § 22-9-302(2) (1995) (enacted 1969); HAW. ADMIN. R. § 12-22-6(1) (1996) (enacted 1955); MINN. R. 5200.1070 (1995) (enacted 1977); N.Y. LAB. LAW § 220(3) (McKinney 1986) (enacted 1966); and WASH. REV. CODE § 39.12.021 (1994) (enacted in 1963).

journey level prevailing wage.[7]

Federal-State coordination of efforts and responsibilities in the promotion of apprenticeship programs and standards has a synergistic effect. States invest heavily in apprenticeship regulation and design programs to suit the particular needs and goals of each State. The States have spent almost three times as much money on apprenticeship as the Federal Government's Bureau of Apprenticeship and Training.[8] The displacement of the States from their traditional role would leave a significant financial hole for the Federal Government to fill. A major construction industry participant has aptly noted:

> the Federal Government lacks the resources to monitor the structure and operations of all apprenticeship programs nationwide. It relies upon the States, through the approved State Apprenticeship Councils, to perform much of this enforcement function.

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[7] For example, New York's lower wage provision for apprentices was enacted in 1966 because certain contractors had been classifying journey level workers in one trade as apprentices in another trade, thereby circumventing the prevailing wage law. The provision was also enacted as an economic incentive for contractors to register apprenticeship programs. At the time, registration of apprenticeship programs was considered threatened by recently enacted non-discrimination standards imposed upon apprenticeship programs. *See Memorandum of The Industrial Commissioner concerning "An Act to amend the labor law in relation to the employment of apprentices on public work,"* Senate Intro. 1609 - Print 1654, 87th Leg., 3d Sess. (June 15, 1966).

[8] General Accounting Office, *Apprenticeship Training: Administration, Use and Equal Opportunity*, GAO/HRD 92-43, 11 (1992).

Senate Committee on Labor and Human Resources, *ERISA Preemption of State Prevailing Wage Laws, Prepared statement of Robert A. Georgine, president, Building and Construction Trades Department, AFL-CIO*, 103rd Congress, 2d Sess. at 66 (March 10,1994).

The *Dillingham* decision provides an economic disincentive for contractors to devote resources to the provision of necessary, comprehensive apprenticeship programs. If allowed to stand, the *Dillingham* decision will have one of two results. Either a contractor will no longer have to demonstrate that an individual on a job site is actually in a bona fide apprenticeship program because mere classification of a laborer as an "apprentice" will be sufficient to allow an apprentice wage rate, or, more likely under the analysis used in *Dillingham*, States will be prohibited from allowing any distinct wage rates for "apprentices" because such incentives would encourage apprenticeship over other training programs. *See National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1115 (10th Cir.), *cert. denied*, 113 S. Ct. 406 (1992). In that case, states desiring completion of quality public works projects will likely react by removing the apprentice wage rate all together. This will significantly increase the cost of public work to the states and remove the economic incentive for contractors to use apprentices on state public work. Bona fide apprenticeship programs that depend on public works to provide the thousands of on-the-job training hours needed to produce a trained, journey-level employee will vanish.

B. State Laws Which Use Economic Incentives To Encourage Quality Control Standards For Apprenticeship Training Do Not Relate To ERISA-Covered Apprenticeship Plans.

Congress enacted ERISA as a "comprehensive statute designed to promote the interests of employees and their beneficiaries in employee benefit plans." *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 90 (1983). However, ERISA's protection of participants in employee benefit plans, such as apprenticeship training, extends only to the administration of benefit plans. *New York State Conference of Blue Cross and Blue Shield Plans v. Travelers Insurance Co.*, 115 S. Ct. 1671 (1995)(*"Travelers"*). ERISA does not require the provision of benefits, nor does it substantively regulate any of the benefits which may be provided by plans.

ERISA does contain a preemption provision which broadly preempts "any and all State laws insofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA. 29 U.S.C. § 1144(a). This Court, in an early attempt to define the scope of ERISA preemption had held that a law "relates to" an employee benefit plan if it has a "connection with or reference to such a plan." *Shaw*, 463 U.S. at 96-97; *see also Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 739 (1985); *Pilot Life Ins. Co. v. Dedaux*, 481 U.S. 41, 47 (1987); *Ingersoll-Rand v. McClendon*, 498 U.S. 133, 138-39 (1990). Last year, in *Travelers*, this Court acknowledged the limitations of its earlier test, stating that "we have to recognize that our prior attempt to construe the phrase 'relate to' does not give us much help drawing the line here." 115 S. Ct. at 1671.

In *Travelers*, this Court held that a state law which has an indirect economic influence on the choices ERISA plans make concerning benefit structures or administrative practices, but which does not bind plan administrators to any particular choice, does not relate to ERISA plans for purposes of federal preemption. Guided by "respect for the separate spheres of governmental authority preserved by our federalist system," this Court reaffirmed that it approaches preemption questions with the "presumption that Congress does not intend to supplant state law." 115 S. Ct. at 1676 (*citing Alessi v. Raybestos-Manhattan*, 451 U.S. 504, 522 (1981)). Moreover, in cases where the state is acting in areas of traditional state concern, the Court works on the assumption "that the historic police powers of the States are not to be superseded by the federal Act unless that was the clear and manifest purpose of Congress." *Id.* at 1676 (citations omitted).

Recognizing that the key phrase "relate to" is unhelpful, this Court looked instead to the objectives of ERISA as a guide in determining which state laws Congress intended ERISA to preempt. Since the intent of ERISA's preemption clause is to "avoid a multiplicity of regulation in order to permit the nationally uniform administration of employee benefit plans," a state law which does not bind plan choice, but merely influences it, does not "function as a regulation of the ERISA plan itself", unless the influence is so great that ERISA plans are forced to adopt certain administrative schemes. *Id.* at 1678, 1679, and 1683. Applying these principles to state regulation of apprentice wages on state public work projects yields the conclusion that such regulation does not relate to ERISA-covered apprentice training plans.

1. State Laws Which Regulate Apprentice Wages Do Not Refer To Nor Are They Specifically Directed Toward ERISA Plans.

In *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 103, 125 (1992), this Court held that a law which "specifically refers to employee benefit plans regulated by ERISA" was preempted. In *Travelers*, this Court held that health care surcharges did not refer to ERISA plans because they were imposed on commercial insurers and health maintenance organizations regardless of whether coverage was purchased by an ERISA plan. 115 S. Ct. at 1683. Similar to the health care surcharges addressed in *Travelers*, California's prevailing wage law exemption for registered apprentices is a law of general application which does not refer to, single out, or subject ERISA plans to different treatment. All contractors are required to limit the apprentice wage to apprentices in approved programs regardless of whether the apprenticeship program is a benefit provided by a plan subject to ERISA. Thus, the apprentice wage rate provision operates without regard to whether the apprenticeship program is a benefit plan subject to ERISA. The Ninth Circuit ignored *Travelers* and failed to recognize that apprenticeship programs can exist independent of an ERISA plan.

Like health care or day care, apprenticeship is a benefit provided by ERISA plans but it is not an ERISA plan itself.[9] Nor, is it provided exclusively by employers.

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[9] The short hand term "ERISA plan" is used instead of employer welfare benefit plan, recognizing that some employee welfare benefit plans are exempt from ERISA coverage, i.e., governmental plans. 29 U.S.C. § 1003(b)(1).

Apprenticeship programs can, under federal regulation, be sponsored by any "person, association or community group" and, as such, are not necessarily sponsored by entities subject to ERISA. 29 C.F.R. § 29.2(g). Even when apprenticeship programs are sponsored by employers, they are not necessarily governed by ERISA for "neither on-the-job training nor classroom training paid for out of an employer's general assets is an ERISA plan." 29 C.F.R. § 2510.3(b)(3)(12). Thus, employers who pay for apprenticeship out of general assets have not created an employee benefit plan governed by ERISA.

Laws of "general applicability" usually have only a tenuous, remote, or peripheral connection with an ERISA-covered plan. *District of Columbia v. Greater Washington Board of Trade*, 506 U.S. 125, n.1 (1992). A law of "general applicability" is one applicable to a broader class than that at issue in a particular case.[10] The apprentice prevailing wage rates at issue apply to all contractors and all apprentices irrespective of whether the apprenticeship program is subject to ERISA and, therefore, are laws of general applicability.

Many apprenticeship programs are provided through ERISA plans. However, the fact that employee benefit plans are a significant segment of a broader class covered by a law does not lessen the general applicability of the

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[10] *Gade v. National Solid Wastes Management Ass'n*, 505 U.S. 88 (1992), involved preemption under the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.* The Court noted that, in that context, non-occupational safety laws which affected workers, such as traffic safety laws or fire safety laws, were laws of general applicability. *Id.* at 107. In *New York State v. United States*, 505 U.S. 144 (1992), a Tenth Amendment case, the Court indicated that laws that subjected states to the same standards as private parties were "generally applicable laws." *Id.* at 160.

law. Indeed, in *Travelers*, ERISA plans were a major source of private health care coverage, estimated by the Second Circuit to provide coverage to eighty-eight percent of the non-elderly population. *The Travelers Insurance Co. v. Cuomo*, 14 F.3d 708, 711 (2d Cir. 1994), *rev'd sub nom, New York State Conf. of Blue Cross and Blue Shield Plans v. The Travelers Insurance Co.*, 115 S. Ct. 1671 (1995). However, that did not transform a law that regulated health generally into a law which made reference to or was specifically directed toward ERISA plans. *Travelers*, 115 S. Ct. at 1676. For the same reason, the California regulation allowing a lower prevailing wage rate for registered apprentices is not preempted because it does not make reference to ERISA plans.

2. State Laws Which Encourage, But Do Not Require, Apprenticeship Programs to Be State-Approved, Do Not Relate To ERISA Plans.

Congress, in enacting the Fitzgerald Act, restricted the national policy on apprenticeship to voluntary stimulation and the states have followed suit. The use of apprenticeship as a training method is voluntary, adherence to the minimum standards for apprenticeship is voluntary, and the States' involvement in the Fitzgerald Act's cooperative federalism scheme for apprenticeship supervision is voluntary. Like the federal government, none of the *amici* States require that apprenticeship programs be registered in order to operate. However, as an incentive to submit to registration, certain privileges are offered by the States only to registered programs.[11]

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[11] For example, New York confers the following privileges: eligibility for local governmental financial aid, (N.Y. LAB. LAW § 816-a (McKinney 1989)); state responsibility for providing the related

One of these incentives is limiting the apprentice prevailing wage rate for apprentices on state public works to registered apprentice programs. The federal government offers the same incentive by a comparable exemption from the Davis-Bacon Act, the federal prevailing wage law. 40 U.S.C. § 276a - 276a(5) (1988).

Another incentive is found in the application of lower minimum wage rates. Several states permit the payment of less than minimum wages to persons registered in a state-approved apprenticeship program.[12]

(Footnote 11 cont.)
classroom instruction, (N.Y. LAB. LAW § 812 (McKinney 1989)); eligibility for a state certificate of completion to individuals who complete the program, (N.Y. COMP. CODES R. AND REGS. tit. 12 § 601.5(14) (1992)); access to the state forum for the resolution of disputes, (*Id.* at § 601.6(k) (1992)); and the ability of employers to pay less than prevailing wages to state registered apprentices on public work jobs. (N.Y. LAB. LAW § 220 (McKinney 1986)).

Washington mandates a progressively increasing wage scale, and offers the use of state services for resolution of disputes arising out of apprenticeship agreements, (WASH. REV. CODE § 49.04.050 (1994)); apprentices receive a substantial tuition cut (only pay 30%) for courses offered for the purpose of satisfying related or supplemental educational requirements, (WASH. ADMIN. CODE § 131-28-026 (1995)); electrical work can be performed without the requirement of a license or certification, (WASH. REV. CODE § 19.28.610 (1994)); while an apprentice attends supplemental and related instruction courses all workers compensation premiums are paid by the State Apprenticeship Council, (WASH. REV. CODE §§ 51.12.130, 51.16.140 and 51.32.073 (1994)); Washington also allows for payment of lower apprentice wage rates on public works contracts. (WASH. REV. CODE § 39.12.021 (1994)).

[12] *See*, N.Y. LAB. LAW § 651(5)(f) (McKinney 1988); WASH. REV. CODE § 49.46.060 (1994), WASH. ADMIN. CODE § 296-128-225 to 250, see also WASH. ADMIN. CODE § 296-128-005 to 040 (1995).

The Ninth Circuit found this scheme related to ERISA covered plans because it has the effect and possibly the aim of encouraging participation in one kind of ERISA plan - a state regulated one, over another, an unregulated one. *Dillingham*, 57 F.3d at 719 (citing *National Elevator Industry, Inc. v. Calhoon*, 957 F.2d 1555 (10th Cir.), *cert. denied*, 113 S. Ct. 406 (1992)). The California apprenticeship law encourages participation in one kind of apprenticeship program over another, without regard to whether the program is an ERISA plan or not. The court in *Dillingham* ignored that this was equally true of the state regulatory scheme at issue in the *Travelers* case.

In *Travelers*, the lower courts found that the purpose of the hospital rate surcharges was to have health insurance customers, including ERISA plans, switch their coverage to Blue Cross. The scheme related to plans, according to these courts, because it purposefully interfered with the choices ERISA plans made. *Travelers*, 115 S. Ct. at 1675-76. Although this Court found that there was no evidence that all health insurance customers were, in fact, driven to Blue Cross, the Court accepted that the surcharges purposely had an indirect economic influence on the administrative and/or benefit structure choices made by ERISA plans. However, because such an influence did not dictate or restrict plan decisions, it did not relate to plans. 115 S. Ct. at 1675.

Apprentice exemptions from state prevailing wage laws operate in a similar fashion. The economic incentive the laws provide to registered apprenticeship programs may influence an apprenticeship program's decision whether or not to seek state approval, but it does not mandate any plan's choice.

Neither California nor any of the *amici* States require registration of apprenticeship programs. The apprentice exemption does not regulate what any apprentice, registered or not, is paid on private construction work or on federal public work jobs. It does not require the use of registered apprentices on state public work projects. Nor does it prohibit the use of unregistered apprentices on public work projects. It does not regulate an ERISA benefit plan or an apprentice program directly -- it regulates a third party to the plan or program, the employer. Even if the apprenticeship program is provided through an ERISA benefit plan, it does not regulate any aspect of an ERISA plan because an employer's payment of wages is a "payroll practice" not covered by ERISA. *See* 29 C.F.R. § 2510.3-1(b)(1); *Massachusetts v. Morash*, 495 U.S. 107 (1989). Its only effect upon plans is that it may influence a plan's decision concerning whether it will agree to adhere to the Fitzgerald Act's minimum standards designed to assure the quality of the apprenticeship training provided.

Nor is the practical effect of the apprenticeship exemption to bind plan choice by effectively forcing plans to seek state registration. While the federal government and twenty-seven of the thirty-one states which have prevailing wage laws have such an exception, it is estimated that only fifty percent of apprentices in this country are in state or federally "approved" programs.[13]

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[13] *See* Employment and Training Administration, *Report on Project to Test the Feasibility of Developing Data on Non-Registered Apprentices By Occupation and Industry and By State Using Two Ongoing Statistical Programs*, Grant No. 21-51-78-22, United States Department of Labor (1978); Robert W. Glover, *Apprenticeship in America: An Assessment*, in the Proceedings of the Industrial Relations Research Association 27th Annual Meeting, 1974 p. 80, cited in New York, *Industrial Commissioners Determination On An Application For*

A contractor who chooses not to use registered apprentices has numerous options. First, contractors can bid on public work and forgo the use of any apprentices on such jobs. Many public work jobs are completed without the use of apprentice labor. Second, contractors can use non-registered apprentices on public work jobs and pay them full wages. Finally, contractors can restrict themselves to private construction where there are no prevailing wage requirements.[14] The fact that apprenticeship programs can and do operate without subjecting themselves to state or federal minimum standards is ample evidence that apprentice exemptions from state prevailing wage laws operate merely as an economic influence on plan decisions and, consequently, are insufficiently related to ERISA plans to be preempted.

3. The State Approval Requirement Does Not Relate To The Administration Of Plans, It Merely Controls The Quality Of A Benefit Provided By Plans.

California's apprentice exemption has an even more remote and tenuous connection to ERISA plans than did the hospital rate regulation scheme in *Travelers*. In *Travelers*, the surcharges had an indirect economic influence on a

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(Footnote 13 cont.)
Registration of An Apprentice Training Program By International Brotherhood of Teamsters Local 363, Joint Apprenticeship Committee, (May 27, 1980).

[14] For example, in New York approximately half of all construction is not subject to state or federal prevailing wage requirements. F.W. Dodge Division, McGraw-Hill Information Systems, Inc. (1996).

plan's choice regarding the method of providing health care benefits. That choice of benefit structure and administration is what ERISA preemption is designed to protect from inconsistent regulation. In this case, however, the indirect economic influence of the apprentice exemption is not on a plan's decision whether to provide training benefits, but on whether to adhere to the Fitzgerald Act's minimum apprenticeship standards by seeking state registration.

Apprenticeship standards are designed to "safeguard the welfare of apprentices." 29 U.S.C. § 50. Thus, the state apprenticeship standards are quality control standards, "intended to insure that apprenticeship training programs developed and registered in accordance with the public policy are of the highest possible quality in all aspects of on-the-job training and related instruction and that all apprenticeship training programs provide meaningful employment and relevant training for all apprentices." N.Y. COMP. CODES R & REGS. tit. 12, § 601.1 (1992); WASH. ADMIN. CODE § 296-04-001 (1995). As such, they may relate to the quality of the benefit provided by the plan, but not to the plan's administration or choice of benefit structures. ERISA does not address in any manner a plan participant's interest in the quality of benefits provided by plans. Nor is this an area with which ERISA preemption is concerned. Thus, even if the practical effect of the apprentice exemption is to coerce plans to register with the state, which it is not, it does not relate to ERISA plans.

In *Fort Halifax Packing Co., Inc. v. Cogne*, 482 U.S. 1 (1986), this Court held that ERISA preempts state laws that relate to the administration of plans, not benefits. It described the purpose of preemption as protecting the uniform administration of plans.

> An employer that makes a commitment systematically to pay certain benefits undertakes a host of obligations, such as determining the eligibility of claimants, calculating benefit levels, making disbursements, monitoring the availability of funds for benefit payments, and keeping appropriate records in order to comply with applicable reporting requirements. The most efficient way to meet these responsibilities is to establish a uniform administrative scheme, which provides a set of standard procedures to guide processing of claims and disbursement of benefits.

Id. at 9.

Eligibility determinations, calculation of benefit levels, disbursements, and monitoring plan funds and records are administrative practices protected by ERISA's preemption provision. However, this Court has also made clear that not every practice or function performed by a plan administrator is relevant to preemption. *Mackey v. Lanier Collection Agency & Service*, Inc., 486 U.S. 825 (1988).

Adhering to the Fitzgerald Act's apprenticeship standards does not affect the administration of the ERISA plan but rather the quality of the training, the benefit provided by the plan. The Fitzgerald Act's apprenticeship standards, which have been adopted by all the *amici* States with Apprenticeship Councils, require the following:

(1) a written apprenticeship plan;
(2) a minimum term of apprenticeship;
(3) an outline of the work processes in which an

apprentice will receive supervised on-the-job training and an allocation of the time to be spent in each major process;

(4) a minimum number of hours of related instruction;
(5) a numeric ratio of journeymen to apprentices consistent with proper training;
(6) a progressively increasing scale of wages;
(7) periodic review of an apprentice's progress;
(8) adequate and safe facilities for training; and
(9) a certificate upon successful completion.

29 C.F.R. § 29.5. The only impact these quality control standards may have on the administration or benefit structure of an ERISA plan is the economic one of increasing the cost of providing the benefit. Thus, registered apprenticeship programs may be more costly than unregistered ones.

However, as this Court recognized in *Travelers*, that effect is not sufficient to relate to plans. In fact, in *Travelers* this Court specifically addressed quality control standards. Quality control standards set by the state in the area of hospital services indirectly effect the cost of providing benefits, but the common character of these regulations leaves the Congressional intent to preempt them even less likely. 115 S. Ct. 1679. The same is true in this case.

ERISA does not regulate the quality of benefits provided by plans, such as medical care, day care, legal services, or apprenticeship training. These are matters of traditional state concern. Thus, when an employer provides health care benefits, ERISA governs the administration of the plan, but the quality of the hospital services is still governed by state standards and the quality of medical care provided by professionals is still guided by

state medical malpractice standards. This is so even when the medical malpractice claim is against a health maintenance organization which, instead of paying for care received elsewhere, actually provides the medical care to the plan participants. *See Pacificare of Okla., Inc. v. Burrage*, 59 F.3d 151 (10th Cir. 1995); *Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350 (3d Cir. 1995); *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321 (5th Cir. 1992).

Similarly, when an employer chooses to provide a prepaid legal services plan, ERISA may govern the administration of the plan, but the practice of law is still regulated by the states. Finally, when an employer provides on-site day care, the minimum sanitary, staffing and programmatic aspects of the benefit, the day care itself, are regulated by the state.

Indeed, the Fitzgerald Act's minimum apprenticeship standards are very comparable to state-imposed quality control standards for day care centers. For example, New York and Washington day care centers have a minimum staff-child ratio, N.Y. COMP. CODES R. & REGS. tit. 18, § 418.5(h) (1992); WASH. ADMIN. CODE § 388-150-190 (1995). The Fitzgerald Act standards require that apprenticeship programs have a minimum ratio of journeymen to apprentices. 29 C.F.R. § 29.5(b)(7). New York and Washington have minimum programmatic standards for child care which specify how often meals and rest periods must be provided, and require certain equipment and space be available. N.Y. COMP. CODES R. & REGS. tit. 18, §§ 418.10, 418.11(e), 418.11(m) (1992); WASH. ADMIN. CODE §§ 388-150-110, .140, and .240 (1995). The Fitzgerald Act standards require a minimum number of hours of on-the-job and related instruction and require that for each trade the content of the related instructions be specified. 29 C.F.R. § 5(b)(2), (4). In

New York and Washington, day care centers must have a written activity plan designed to meet the developmental needs of the child. N.Y. COMP. CODES R. & REGS. tit. 18, § 418.12(a)(9) (1992); WASH. ADMIN. CODE § 388-150-100 (1995). The Fitzgerald Act standards require a written plan of apprenticeship embodying the terms of employment, training and supervision. 29 C.F.R. § 29.5(a). New York and Washington require day care centers periodically to report on the child's progress to parents. N.Y. COMP. CODES R. & REGS. tit. 18, § 418.4(c)(26) (1992); WASH. ADMIN. CODE § 388-150-170 (1995). The Fitzgerald Act standards also require periodic evaluation and review of an apprentice's progress. 29 C.F.R. § 29.5(b)(6). New York and Washington impose safety standards on day care centers. N.Y. COMP. CODES R. & REGS. tit. 18, § 418.2 (1992); WASH. ADMIN. CODE § 388-150-280 (1995). The Fitzgerald Act standards also impose safety standards on apprenticeship programs. 29 C.F.R. § 29.5(b)(9).

These type of requirements also are similar to the state regulation of the quality of health care, another benefit often provided by plans. Thus, New York and Washington impose quality control standards on hospitals, regulate the training of doctors and medical support personnel, and set medical malpractice standards. N.Y. COMP. CODES R. & REGS. tit. 10, Part 405, § 405.4 (1989); Title 18, Business and Professions, WASH. REV. CODE (1994); Title 70, Public Health and Safety, WASH. REV. CODE (1994); Ch. 43.70 and Ch. 43.20 WASH. REV. CODE (1994).

In most instances these quality control standards are not applied directly to plans. The plans simply pay for the medical, legal, or day care services. However, when benefits are provided in-kind by a plan, such as when

employers provide day care on the work site, provide prepaid legal services through the staff model, operate their own medical facility, or provide on-the-job apprenticeship training, the quality control regulations may be applied more directly to plan activities. Even so, they relate only to the quality of the benefit provided, not to the administration of the plan and are not preempted. Any other result would deny the states the right to regulate on-site day care, infectious waste control at plan owned medical centers, and the quality of care provided by health maintenance organization employed doctors.

Congress did not intend to preempt state regulation of apprenticeship training standards or wages on state public works, or any of these related areas of regulation traditionally occupied by state law.[15]

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[15] If, contrary to what we have argued, California's statutory scheme is found to "relate to" ERISA plans within the meaning of ERISA § 514(a), the Court would then have to consider whether the California statutory scheme is saved from ERISA preemption by ERISA § 514(d). This section provides, in pertinent part, that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any of the laws of the United States ... or any rule or regulation issued under such law." 29 U.S.C. § 1144(d). The role of the States in the promotion, provision and enforcement of minimum apprenticeship standards is integral to the fulfillment of the Fitzgerald Act's mandate. We therefore embrace the position of petitioners and other supporting amici on the savings clause issue.

III. CONCLUSION

ERISA preemption of state laws allowing sub-journey prevailing wage rates for apprentices in state-approved apprenticeship programs will significantly impair the longstanding federal-state cooperative effort in the formulation, promotion, and enforcement of quality apprenticeship programs and standards and the respective prevailing wage laws of the *amici* States. Under this Court's decision in *Travelers*, state laws which use economic incentives to encourage quality control standards do not relate to ERISA covered benefit plans. State laws allowing sub-journey prevailing wage rates for apprentices in state approved programs encourage, but do not require, apprenticeship programs to be state-approved.

Furthermore, the state approval requirement does not relate to the administration of plans; it merely controls the quality of a benefit provided by plans. For these reasons, such laws do not relate to ERISA benefit plans and the Ninth Circuit's decision should be reversed.

DATED this 17th day of June, 1996.

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APPENDIX

TABLE IV-1
Existence of Prevailing Wage Laws, by State

States Having Prevailing Wage Laws	Date of Law
Alaska	1931
Arkansas	1965
California	1931
Connecticut	1935
Delaware	1962
District of Columbia	1931
Hawaii	1965
Illinois	1931
Indiana	1935
*Kansas	1891
Kentucky	1982
Louisiana	1968
Maine	1933
Maryland	1945
Massachusetts	1914
Michigan	1965
Minnesota	1973
Missouri	1957
Montana	1931
Nebraska	1923
Nevada	1937
New Jersey	1913
New Mexico	1937
New York	1897
Ohio	1931
Oklahoma	1965
Oregon	1959
Pennsylvania	1961
Rhode Island	1935
Tennessee	1963
Texas	1933
Washington	1945
West Virginia	1933
Wisconsin	1931
Wyoming	1967

States Without Prevailing Wage Laws
Georgia
Iowa
Mississippi
North Carolina
North Dakota
South Carolina
South Dakota
Vermont
Virginia

States With Repealed Laws	Date of Law	Date of Repeal
Alabama	1969	1981
Arizona	1912	1984
Colorado	1933	1985
Florida	1933	1979
Idaho	1911	1985
New Hampshire	1941	1985
Utah	1933	1981

* Kansas repealed its prevailing wage law in 1987.

Source: Individual state laws and Wharton Industrial Research Unit survey, state departments of labor, 1982.